CRIMINAL LAW: CRIMINAL SYNDICALIST ACT: CONSTITUTIONAL LAW: VALIDITY OF THE ACT UNDER THE FREE SPEECH CLAUSE—The crime of criminal syndicalism has existed in California since April 30, 1919.[1] The act was passed at a time when active radical minorities threatened or were believed to threaten not only the stability but the existence of our political and social structure. The Russian debacle, unillumined by historical investigation, confronted us. It is immaterial whether the fear was hysterical or justified by the facts. The result was widespread legislation by the states strengthening their criminal law to meet the situation.[2] Some statutes went so far as to declare any opposition to the present form of government a crime.[3] The California statute is among the more conservative; it establishes as the essence of criminal syndicalism the use of force or violence directed against either person or property to effect a change in industrial or political organization. The crime consists in doing any act in furtherance of criminal syndicalism, in advocating it, or in belonging to an organization advocating it. Different methods of advocating it specified as criminal are publishing, or publicly displaying any literature advising it, and justifying its doctrines with intent to advocate them.

Numerous prosecutions have occurred under the Act and the following cases have been decided by the appellate courts: *In re McDermott,*[4] *People v. Malley,*[5] *People v. Lessee,*[6] *People v. Steelick,*[7] *People v. Taylor*[8] *People v. Whitney,*[9] *People v. Roe,*[10] *People v. Wismer.*[11] McDermott was indicted for circulating and displaying the forbidden literature. His petition for habeas corpus was denied on the ground that there was nothing unconstitutional in the statute in regard to the charge against him. Malley was convicted of the same phase of the offense. Lessee was convicted on an indictment charging him with a violation of all the subsections of

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[1] Cal. Stats. 1919, p. 281, 2 Hennings Gen. Laws, p. 3281, § 1, defines criminal syndicalism as "any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property) or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Section 2 makes various activities in furtherance of criminal syndicalism enumerated in the five subdivisions, a felony punishable by imprisonment for from one to fourteen years.

[2] Chafee, Freedom of Speech, p. 190 and Appendix IV, part 2, p. 401.

[3] New Jersey Laws of 1920, p. 448; New Mexico Session Laws 1919, p. 295.

[4] (July 31, 1919) 180 Cal. 783, 183 Pac. 437.

[5] (Oct. 18, 1920) 33 Cal. App. Dec. 346, 194 Pac. 48, rehearing denied Nov. 16, 1920.

[6] (April 15, 1921) 34 Cal. App. Dec. 1011, 199 Pac. 46.

[7] (Nov. 12, 1921) 63 Cal. Dec. 536, 203 Pac. 78; rehearing denied Dec. 12, 1921; decision of District Court of Appeal reported in 33 Cal. App. Dec. 594.

[8] (Nov. 12, 1921) 62 Cal. Dec. 546, 203 Pac. 85; rehearing denied Dec. 12, 1921; decision of District Court of Appeal reported in 34 Cal. App. Dec. 414, 193 Pac. 871.

[9] (April 25, 1922) 38 Cal. App. Dec. 26.

[10] (Aug. 4, 1922) 38 Cal. App. Dec. 750.

[11] (Aug. 4, 1922) 38 Cal. App. Dec. 743.

the Act. Membership in the I. W. W. was the evidence that established the guilt of Steelick, Roe and Wismer of knowingly belonging to an organization advocating criminal syndicalism. Miss Anita Whitney and Taylor were convicted for their activities in organizing the Communist Labor Party of California. Taylor had been present at the Chicago convention when the "Left Wing" of the Socialist party broke away and established the Communist Labor Party. On his return, he acted as secretary at the convention of its California branch and was instrumental in transferring to the new party the allegiance of the "locals" of the Socialist party. Miss Whitney was chairman of the committee on resolutions and was chosen as alternate member of the executive committee. Academically it is disputable whether or not this party was directly committed to accomplishing its revolutionary program by violence,[12] but in each case the jury decided that its indorsement of the Communist Manifesto of the Third International at Moscow, its praise of the I. W. W. and its advocacy of industrial unionism necessarily implied the advocacy of violence.

The question of the constitutionality of the Act was raised in some of the cases and it was sustained.[13] Statutes of this type and the Espionage Act have been attacked most vigorously on the ground that they violated the constitutional guarantees of free speech and a free press.[14] The free speech clauses of the state and Federal constitutions are more than a statement of political faith; they impose restrictions on the respective legislative bodies. Although the right to free speech is clear, it is equally clear that it is not unlimited.[15] The lines marking the limits of constitutional restriction cannot be determined by any accurate legal surveying. The difference between the valid and the invalid is one of degree only. On the one hand, the law may penalize expression which interferes with the reputation or property rights of others; it may punish

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[12] The term "revolutionary" is used in this connection to describe a complete change in the social system rather than the means by which it is accomplished. The usage is analogous to that in the term "the industrial revolution."

[13] In re McDermott, supra, n. 4; People v. Malley, supra, n. 5; People v. Steelick, supra, n. 7; People v. Taylor, supra, n. 8. The California cases cite and follow People v. Moilen (1918) 139 Minn. 265, 167 N. W. 345; and State v. Hennessey (1921) 113 Wash. 408, 195 Pac. 271. On the same point see Fox v. State of Washington (1914) 236 U. S. 273, 35 Sup. Ct. Rep. 383, 59 L. Ed. 573; and People v. Most (1902) 171 N. Y. 423, 58 L. R. A. 509.

[14] "Congress shall make no law . . . abridging the freedom of speech or of the press . . ." U. S. Const. Amendment I. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Cal. Const., Art. I, § 9.

[15] For a discussion of this subject see Chafee, Freedom of Speech, pp. 3-39, 203-207; Thomas F. Carroll, Freedom of Speech and of the Press in the Federalist Period, 18 Michigan Law Review, 615; James Parker Hall, Free Speech in War Time, 21 Columbia Law Review, 526; John H. Wigmore, The Abrams Case, 14 Illinois Law Review, 539; dissenting opinion of Mr. Justice Holmes in Abrams v. U. S. (1919) 250 U. S. 616, 624, 40 Sup. Ct. Rep. 17, 63 L. Ed. 1173. See also cases cited supra, n. 11.

blasphemy, obscenity, and solicitation to criminal acts.[16] On the other hand, criticism of the existing form of government, of government officials, or advocacy of a change in either the statutory or fundamental law by legal methods cannot lawfully be made criminal. A recent New Mexico case[17] held unconstitutional a state law which forbade opposition to organized government because it failed to distinguish between opposition contemplating the use of force and that contemplating peaceful and legal methods. Similarly In re Hartman decided that an ordinance of Los Angeles prohibiting the display of the red flag was invalid in that it failed to make the same distinction.[18] Tested by this principle the California statute is unquestionably constitutional. There is, however, a margin, dim and difficult to delimit, where unlawful methods are discussed, perhaps advocated, but where there is no intent nor danger that the discussion will "break out into crime." Since Marx and Engels published the Communist Manifesto in 1848 such talk has been freely indulged in by radicals, and, indeed, by some conservatives. May it be prohibited? May certain historic documents enunciating the right of revolution be, with approval, publicly read? Among these are the Declaration of Independence and Lincoln's First Inaugural Address. The latter states:

"This country with its institutions belongs to the people who inhabit it. Whenever they shall grow weary of the existing government they can exercise their constitutional right of amending it, or their *revolutionary right to dismember or overthrow it.*"

Technically construed, the Criminal Syndicalist Act prohibits just such utterances.[19] A solution which avoids these absurd results is suggested by the case of Schenck v. United States[20], which upheld the validity of the Espionage Act. Its constitutional application was limited to situations where the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Upon this principle the Criminal Syndicalist Act was properly held valid, but the test of guilt should always be the clear and present danger that the agitation will result in violence. This test was recognized in the Malley case and the existence of the danger was declared to be a jury

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[16] See discussion on "The Normal Criminal Law of Words" by Chafee in his Freedom of Speech, p. 169.

[17] State v. Diamond (1921) 202 Pac. 988 (N. M.).

[18] (1920) 182 Cal. 447, 188 Pac. 548. See also State v. Tachin (1919) 92 N. J. Law 270, 106 Atl. 145; State v. Gabriel (1921) 112 Atl. 611 (N. J.) State v. Gibson (1919) 175 N. W. 34 (Iowa).

[19] Supra, n. 1. "Any person who by spoken or written words . . . teaches . . . the duty, necessity, or propriety of committing crime, sabotage, violence, or any unlawful methods of terrorism *as a means of . . . . effecting any political change.*"

[20] (1918) 249 U. S. 47, 52, 39 Sup. Ct. Rep. 247

question.[21] A bona fide application of this principle would give that measure of freedom of discussion that the constitution guarantees and would prevent the growth of economic and political abuse under the protection of silence. Furthermore it would draw the line between the valid and the invalid utterance where it is indicated by balancing the social interest in peace and good order against the social interest in freedom of discussion and independence of thought.[22]

Even if the constitutionality of the Act be admitted, the wisdom of making it a permanent part of our penal system is debatable. Any final conclusion must have its roots in the philosophical problem of the nature of truth, in social psychology, especially mob psychology, in the philosophy of crime and punishment, and in the history of previous attempts to cope with unwelcome movements by repression. It is obviously beyond the scope of this note to outline any such conclusion. The remaining space will be devoted to a sketch of the various attitudes toward the syndicalist act.

There are those who believe that such a law is unnecessary, that the ordinary criminal law of attempt, of the liability of those who aid and abet the commission of crime, and of conspiracy sufficiently protect society against violence. In attempt, guilt arises when there is an intent to commit the crime, when the means are apparently adapted to the end and when the acts have progressed dangerously near success.[23] Those who aid and abet the commission of a felony are punishable as principals when the crime occurs.[24] A conspiracy charge may be sustained upon proof of an overt act manifesting a common design to accomplish a proscribed purpose.[25] Under the head of conspiracy a great deal of dangerous radicalism may be reached, since effective action demands concerted effort.

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[21] Supra, n. 5. Transcripts of the testimony in People v. Whitney and People v. Taylor were read in preparation of this comment. It seemed that the emphasis was on the fact that the defendant advocated violence rather than upon any resulting threatened immediate danger.

[22] Roscoe Pound, The Interests of Personality, 28 Harvard Law Review, 343, and 445, 453; Chafee, Freedom of Speech, p. 38. "The true boundary line of the First Amendment can be fixed only when Congress and the Courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests in public safety and in the search for truth."

[23] Cal. Penal Code, §§ 181, 216, 217, 218, 524, and 664 provide for the punishment of attempts. On the point of dangerous proximity to success see People v. Stites (1888) 75 Cal. 570, 17 Pac. 693; People v. Mann (1896) 113 Cal. 76, 45 Pac. 182. On the general subject of attempt see J. H. Beale Jr., Criminal Attempts, 16 Harvard Law Review, 491. Mere solicitation is not a crime in California; Ex parte Floyd (1908) 7 Cal. App. 588, 95 Pac. 175.

[24] Accessories before the fact and principals in the second degree are made punishable as principals in the first degree by §§ 31 and 971 of the Cal. Penal Code: People v. Rozelle (1888) 78 Cal. 84, 20 Pac. 36; People v. Nolan (1904) 144 Cal. 75, 77 Pac. 774; People v. Billings (1917) 34 Cal. App. 549, 168 Pac. 396. See 16 C. J. pp. 125-133.

[25] Cal. Penal Code §§ 182, 184; People v. Daniels (1894) 105 Cal. 262, 38 Pac. 720; People v. Holmes (1897) 118 Cal. 444, 456, 50 Pac. 675.

Subsection 4 of the Act broadens the law of conspiracy, substituting for the element of common design mere membership in a party and omitting the requirement of the overt act. Membership in the I. W. W. or the Communist Labor party is generally sufficient proof of the crime.[26] Yet people may join these organizations for other reasons than the desire to prepare for a program of violence. A malcontent, convinced that the utter injustice of things as they are necessitates a change in the industrial and social system, is not apt to discriminate between legal and illegal methods of accomplishing the change. He will join any organization of which his associates are members; in so doing he becomes criminally responsible for all its tenets and acts. The committee of which Anita Whitney was chairman unanimously reported in favor of political rather than direct action, but her guilt was established because she knowingly remained a member after the report was rejected.[27] The normal law of conspiracy would secure the conviction of all those actually participating in the common dangerous design. This view contemplates the preservation of the peace by means of a better police system rather than by increased prosecution.

There are, on the other hand, those who feel that the present criminal law is inadequate, that it punishes the deed deemed injurious to society but fails to prevent its occurrence by removing those who definitely manifest criminal tendencies. According to this view, punishing the advocacy of crime only when there is a clear and present danger of its success, or preparations only when they have merged into an attempt, resembles the time-honored preventive measure of locking the barn door after the horse is stolen. Likewise he who aids and abets the commission of a crime which never happens is as dangerous a member of society as if he had been successful. An Act such as this furnishes a ready means of catching the clever leaders who otherwise avoid technical criminality. The interest of society in law and order thus outweighs the advantages from public discussion which tends to cause crime.

The opposition answers that conviction for utterances because of their tendency to cause crime is one of the worst features of the Act.[28] Any criticism of existing law is to some persons an invitation to break it. Others may listen unmoved to impassioned pleas for violence. Is not a conviction because of the bad tendency of the words based upon the psychology of the audience? How far may we hold a man responsible for the mental qualities of his listeners? If the intent of the speaker is made the test we only become more deeply involved in the difficulty, since intent can usually be determined by the quality and tendency of the act. Mob psychology is not an exact science, neither is there common knowledge of its principles. Furthermore, it is argued that even though

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[26] People v. Steelick, supra, n. 9; People v. Taylor, supra, n. 8. People v. Whitney, supra, n. 9; State v. Payne (1921) 200 Pac. 314 (Wash.); State v Kowalchuck (1921) 200 Pac. 314 (Wash.).

[27] Transcript of the record in People v. Whitney, Crim. 907 at pp. 296, 297.

[28] Chafee, Freedom of Speech, p. 27.

the ideal application of the law as outlined in the Schenck case is proper, the human machinery of law enforcement is given too great a power over the thought of the community. There is grave danger that the test though legally insisted upon will not be practically enforced.[29] The belief of the jury in the intolerability of the radical doctrines may blind them to the absence of danger from a given enunciation of them.

Others argue that in so far as the act tends to prevent crime and to broaden the scope of the criminal law it is justifiable, but that it is unjust since it applies only to a limited class of incitements and is unequal in its operation. It is aimed at a particular type of agitation, namely, for industrial unionism, communism and anarchy. Advocacy of the "general strike" is prohibited because of its probable concomitant violence. It is a matter of common knowledge that violence often accompanies a trade union strike, yet urging one is not under the ban. The law applies to injury to physical property but not to that which makes it desirable—its market value. It in no way reaches the employer who destroys property to maintain the price level.

The answer is that the prohibited propaganda is so dangerous that it demands special legislation and furnishes a reasonable basis for classification. It threatens the very existence of organized society and its preservation may be justified as necessary to the self-preservation of the body politic.[30]

It may be argued that though it is proper to suppress radical agitation, it is inexpedient since suppression is a better advocate of the cause than words in its behalf: The proponents of this view contend that history demonstrates the futility of repression and point to the prosecutions of the early Christians,[31] of Protestantism under Phillip and Mary, to the attempt to prevent liberal agitation after the Congress of Vienna, and to our own Alien and Sedition Act, which contained within it the cause of its own death.

Finally there are those who believe steadfastly in their views, even to the point of fighting for them, but who feel that no one creed can embody ultimate truth. The dissent of Mr. Justice Holmes in the Abrams case[32] has already become the classical exposition of the attitude of the partisan who is at the same time sufficiently "above the battle" to allow his opponents a free field for discussion:

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[29] Supra, n. 21.

[30] John H. Wigmore, The Abrams Case, supra, n. 15.

[31] The laws against the early Christians were strikingly analogous to our Syndicalist law, since the essence of the crime was being a Christian, not doing any specific act or acts. "The one thing looked for is that which is demanded by the popular hatred, the confession of the name, not the weighing of the charge. Whereas if you were inquiring into the case of some criminal, you would not be satisfied to give a verdict immediately on his confession of the crime, unless you also demanded an account of the accessory facts, the character of the act, the frequency of its repetition . . ." Tertullian's Apology, translated by J. E. B. Mayor, p. 7.

[32] Supra, n. 15.

"But when men have realized that time has upset many fighting faiths, they have come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be carried out. That at any rate is the theory of our Constitution. It is an experiment as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is necessary to save the country." *H. R. M.*

EQUITY: SPECIFIC PERFORMANCE OF CO-OPERATIVE DISTRIBUTION CONTRACTS—The existence and continued success in California of the co-operative system of distribution of agricultural products is put in peril by the decision in the case of the *Poultry Producers of Southern California, Inc. v. Barlow.*[1] The plaintiff, a corporation organized by poultrymen of Southern California, brought suit for specific performance of an agreement of defendant members to sell to the plaintiff all of the eggs produced by the seller "which he intends to sell or market in any event," in consideration of plaintiff's agreement "to use its best efforts to resell said eggs at the best prices obtainable under market conditions." A decree of specific performance was denied, the court holding that mutuality of remedy is a prerequisite to such a decree,[2] and that in this case the required mutuality is lacking because in a similar suit against the association it could be maintained in defense, first, that equity will not enforce an obligation to render such personal services as here involved,[3] and second, that such a decree would be refused as involving continuous acts of supervision by the court.

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[1] (July 11, 1922) 64 Cal. Dec. 71.

[2] Cooper v. Pena (1863) 21 Cal. 404; Stanton v. Singleton (1899) 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; L. A. etc. Development Co. v. Occidental Oil Co. (1904) 144 Cal. 528, 78 Pac. 25; Pacific etc. Ry. Co. v. Campbell-Johnston (1908) 153 Cal. 106, 94 Pac. 623. The mutuality rule as originally stated by Lord Justice Fry was that "a contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might, at the time that it was entered into, have been enforced by either of the parties against the other. Whenever a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other party." Fry, Specific Performance (6th ed.) p. 219. The doctrine has been so torn down by exceptions and extraordinary circumstances to which it has been held not applicable, that now practically nothing remains of the old rule. See Professor Langdell's article in 1 Harvard Law Review, 355, 362-374. Professor Ames in 3 Columbia Law Review, 1, after enumerating eight exceptions to the rule, states his conclusion that "the